No. 16-1027

In The
Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF *AMICI CURIAE* FOURTH AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. A Fourth Amendment "Search" Occurs When the Government's Warrantless Conduct *Either* Infringes On a Reasonable Expectation of Privacy *Or* Involves a Physical Intrusion (a Trespass) On a Constitutionally Protected Area to Perform an Investigation 9

A. *Katz*-Based Doctrines Should Be Reexamined in Light of *United States v. Jones* and *Florida v. Jardines* When Those Doctrines Undermine the Trespass Test's Interpretation of Fourth Amendment Protection 16

II. Neither *United States v. Jones* Nor *Florida v. Jardines* Signal That the Automobile Exception – a Per Se, *Katz*-Based Warrant Exception – Can Trump the Fourth Amendment's Traditional Baseline of Protection Under the Trespass Test 20

A. The Automobile Exception Evolves, After *Katz*, into a Per Se Warrant Exception 22

III. The Automobile Exception Does Not Automatically Apply to the Search of an Unattended Vehicle Parked Within a Home's Curtilage 27

TABLE OF CONTENTS – Continued

Page

A. An Area That Is "Open to the Public" Can Receive Fourth Amendment Protection as Part of a Home's Curtilage..... 28

B. The Trespass Basis of Fourth Amendment Protection Was Violated by the Officer's Detour from the Direct Path to the Front Door and Physical Search of Petitioner's Tarp-Covered Motorcycle..... 32

1. The Officer's Warrantless Investigation of Petitioner's Motorcycle Is Not Saved by *New York v. Class*, *United States v. Jacobsen*, or the Plain View Doctrine 33

CONCLUSION 37

APPENDIX

List of *Amici Curiae* 1a

TABLE OF AUTHORITIES

Page

CASES:

Arizona v. Hicks, 480 U.S. 321 (1987).....36, 37
Bond v. United States, 529 U.S. 334 (2000).....10
Brinegar v. United States, 338 U.S. 160 (1949).....23
Boyd v. United States, 116 U.S. 616 (1886).....27
California v. Acevedo, 500 U.S. 565 (1991).....11
California v. Carney, 471 U.S. 386 (1985).....21, 22
California v. Ciraolo, 476 U.S. 207 (1986).....27, 31
Carroll v. United States, 267 U.S. 132 (1925) ....*passim*
Chambers v. Maroney, 399 U.S. 42 (1970).....25
Collins v. Commonwealth, 773 S.E.2d 618 (Va. Ct. App. 2015).....29
Collins v. Commonwealth, 790 S.E.2d 611 (Va. 2016).....5, 20, 28, 29
Coolidge v. New Hampshire, 403 U.S. 443 (1971) ... 24, 35
Cooper v. California, 386 U.S. 58 (1967) 24
Florida v. Jardines, 569 U.S. 1 (2013).....*passim*
Horton v. California, 496 U.S. 128 (1990) 35, 36
Husty v. United States, 282 U.S. 694 (1931).....23
Katz v. United States, 389 U.S. 347 (1967).....*passim*
Kentucky v. King, 563 U.S. 452 (2011).....32
Kyllo v. United States, 533 U.S. 27 (2001).....9, 11
Maryland v. Dyson, 527 U.S. 465 (1999) 22

TABLE OF AUTHORITIES – Continued

Page

Mincey v. Arizona, 437 U.S. 385 (1978) 6

Minnesota v. Dickerson, 508 U.S. 366 (1993) 66

New York v. Class, 475 U.S. 106 (1986) 33

Oliver v. United States, 466 U.S. 170 (1984) 6, 27

Pennsylvania v. Labron, 518 U.S. 938 (1996).....22

Preston v. United States, 376 U.S. 364 (1964).....23

Scher v. United States, 305 U.S. 251 (1938).....23

Silverman v. United States, 365 U.S. 505 (1961).....9

South Dakota v. Opperman, 428 U.S. 364 (1976).....22

Steagald v. United States, 451 U.S. 204 (1981) 3, 6, 15, 19

Thims v. Commonwealth, 235 S.E.2d 443 (Va. 1977) 28

United States v. Ackerman, 831 F.3d 1292 (10th Cir. 2016) .....*passim*

United States v. Jacobsen, 466 U.S. 109 (1984)....*passim*

United States v. Jones, 565 U.S. 400 (2012) .....*passim*

United States v. Martinez-Fuerte, 428 U.S. 543 (1976).....27

United States v. Ross, 456 U.S. 798 (1982)..... 20, 22, 24, 25, 26

United States v. United States District Court, 407 U.S. 297 (1972) 10, 27

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. IV.....*passim*

INTRODUCTION

The *amici curiae* submit this Brief in support of Petitioner, and urge the Court to reverse the decision of the Supreme Court of Virginia.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are criminal procedure professors who teach, study, and write about the Fourth Amendment. *Amici* submit this brief in support of Petitioner's position that, notwithstanding the automobile exception, the Fourth Amendment is violated when, in the absence of exigent circumstances, a police officer enters a home's curtilage to conduct a warrantless, physical search of an unattended vehicle. No other brief submitted in this case considers the question of the erosive impact on the Court's traditional (trespass-based), Fourth Amendment interpretation if the automobile exception were held to automatically apply to vehicles parked within a home's curtilage.

[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The issue before the Court is whether the automobile exception to the Fourth Amendment's warrant requirement supports the search of an unattended vehicle parked within a home's curtilage, without a finding of exigency to justify the officer's warrantless entry onto the curtilage to conduct the physical search. The Virginia Supreme Court held that the automobile exception sufficed to support the officer's entry onto curtilage to perform a physical investigation of Petitioner's tarp-covered motorcycle. In upholding this warrantless search, the Virginia Supreme Court assumed that the automobile exception provided a per se warrant exception, even though the police investigation at issue was made possible only by a warrantless police entry onto a home's curtilage – the traditional basis of Fourth Amendment protection.

This case presents the Court with a critical crossroad in determining the Fourth Amendment's scope and applicability under the Court's trespass interpretation. In *Florida v. Jardines*, the Court made clear that a Fourth Amendment violation occurs if the government's warrantless conduct either (1) infringes on a person's reasonable expectation of privacy, or (2) involves a police investigation made possible by law enforcement's physical intrusion on a constitutionally protected area. *See* 569 U.S. 1, 11 (2013). Although *Katz*'s privacy-expectations test[2] and the trespass analysis come at the Fourth Amendment question from

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[2] *See Katz v. United States*, 389 U.S. 347, 351 (1967).

different angles, they both address the circumstances under which the Fourth Amendment protects a person from warrantless police conduct. Only now, since *United States v. Jones*[3] and *Jardines*, has the trespass basis of Fourth Amendment protection *reemerged* as an intact theory of Fourth Amendment protection – an interpretation that has substance and meaning, independent of *Katz*.

Since our nation's founding, in order for police to enter onto a person's homestead to conduct an investigation, the Fourth Amendment required law enforcement to have a warrant, consent, or exigent circumstances. *See Steagald v. United States*, 451 U.S. 204, 211 (1981). The automobile exception, as originally understood, required consideration, either explicitly or implicitly, of exigency to justify law enforcement's warrantless, probable cause-based search of a vehicle. After *Katz*, however, the Court recognized that there were commonalities involving vehicle travel that supported a per se warrant exception for the probable cause-based search of a vehicle, based upon generalizations regarding drivers' reduced expectation of privacy in vehicles and their public travels.

Amici argue that the automobile exception must not be used to *expand* the constitutional bases for warrantless, police entry onto a home's curtilage – i.e., beyond those involving consent (express or implied), exigent circumstances, or a warrant. Important here, the Court's decisions in *Jones* and *Jardines* have

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[3] *See* 565 U.S. 400 (2012).

undermined the Virginia Supreme Court's conclusions regarding the scope of the automobile exception.

The Fourth Amendment does not support applying the automobile exception – which *amici* argue here is a per se, *Katz*-based warrant exception – to a traditional, trespass-based search and seizure. To do so would erode the "irreducible constitutional minimum" protection guaranteed under the Fourth Amendment's original meaning. *Cf. Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). In addition to producing the constitutional violation in this case, the Virginia Supreme Court's approach is problematic because it unnecessarily *reinjects Katz* into the Fourth Amendment's traditional interpretation.

For these reasons, the Court should reverse the decision of the Virginia Supreme Court, and hold that the automobile exception does not apply to a vehicle that is found, parked and unattended, within a home's curtilage, absent case-specific exigency to justify the officer's warrantless entry and search.

ARGUMENT

The issue before the Court is whether the automobile exception to the Fourth Amendment's warrant requirement supports the search of an unattended vehicle parked within a home's curtilage, without a finding of exigency to justify the officer's warrantless entry onto the curtilage to conduct the physical search. The Supreme Court of Virginia held that the automobile

exception, without more, sufficed to support the officer's entry onto curtilage to perform a physical investigation of Petitioner's tarp-covered motorcycle. *See Collins v. Commonwealth*, 790 S.E.2d 611, 616-17 (Va. 2016) ("[W]e do not find it necessary to independently assess whether exigent circumstances existed here. Rather, the facts of this case are more properly addressed by a different exception to the warrant requirement: the automobile exception."). In upholding this warrantless search, the Supreme Court of Virginia assumed that the automobile exception provided a per se, warrant exception,[4] even though the police investigation at issue was made possible only by a warrantless, police entry onto a home's curtilage – the traditional basis of Fourth Amendment protection.

This case presents the Court with a critical crossroad in determining the Fourth Amendment's scope and applicability under the Court's trespass interpretation. *Amici* urge caution in following the Virginia Supreme Court's chosen road, and argue against importing *Katz*-based, warrant exceptions into cases involving traditional, Fourth Amendment searches and seizures.

Since our nation's founding, in order for police to enter onto a person's homestead to conduct an investigation, the Fourth Amendment required law

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[4] *See id.* at 618 ("[W]e need not decide whether the motorcycle was immediately mobile at the precise moment of the search. The bright-line test does not require us to hypothesize whether it would have been technically possible for Collins to uncover the motorcycle, start the engine, and flee from Officer Rhodes.").

enforcement to have a warrant, consent, or exigent circumstances. *See Steagald v. United States*, 451 U.S. 204, 211 (1981); *see also Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."). For decades after *Katz v. United States*,[5] the Fourth Amendment's trespass basis was *folded into Katz*'s privacy-expectations test, and seemingly ceased to exist as a separate theory of establishing Fourth Amendment protection. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 183 (1984) ("The existence of a property right is but one element in determining whether expectations of privacy are legitimate. The premise that property interests control the right of the Government to search and seize has been discredited.") (internal quotation marks omitted).

But, as the Court made clear in *Florida v. Jardines*, the modern Court has not forgotten the Fourth Amendment's traditional roots and traditional interpretation. *See* 569 U.S. 1, 6 (2013) (rejecting as violating the Fourth Amendment a warrantless, canine sniff – performed at the front door of Jardines's suburban home

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[5] *See generally* 389 U.S. 347, 348, 353 (1967) (holding that the government's warrantless, electronic listening and recording of Katz's telephone conversations – which were overheard through a device attached to the outside of the public telephone booth where Katz made his calls – "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

– because, in obtaining the positive, canine sniff, the officers had "gathered . . . information by physically entering and occupying the area [i.e., the home's curtilage] to engage in conduct not explicitly or implicitly permitted by the homeowner."). After *Jardines*, a Fourth Amendment violation occurs if the government's warrantless conduct either (1) infringes on a person's reasonable expectation of privacy, or (2) involves a police investigation made possible by law enforcement's physical intrusion on a constitutionally protected area. *See id.* at 11 ("The *Katz* reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.") (internal quotation marks omitted); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016). Although these two theories come at the Fourth Amendment question from different angles, they both address the circumstances under which the Fourth Amendment protects a person from warrantless, police conduct. Only now, since *United States v. Jones*[6] and *Jardines*, has the trespass basis of Fourth Amendment protection *reemerged* as an intact theory of Fourth Amendment protection – an interpretation that has substance and meaning, independent of *Katz*.

And therein lies the problem with the Virginia Supreme Court's approach. The automobile exception did

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[6] *See* 565 U.S. 400 (2012).

not begin its journey as a per se, warrant exception. See *infra* Section II. As originally articulated, this warrant exception required consideration, either explicitly or implicitly, of exigency to justify law enforcement's warrantless, probable cause-based search of a vehicle. See *infra* Sections II, II.A. After *Katz*, however, the Court recognized that there were commonalities involving vehicle travel that supported a per se, warrant exception for the probable cause-based search of a vehicle, based upon generalizations regarding drivers' reduced expectation of privacy in vehicles and their public travels. See *id.* But it must not be forgotten that the original view of the automobile exception was different.

Amici argue that the Fourth Amendment does not support mechanically applying a per se, *Katz*-based warrant exception to a traditional, trespass-based search and seizure. To do so would erode the "irreducible constitutional[ly] minimum" protection guaranteed under the Fourth Amendment's original meaning. *Cf. Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). In addition to producing the constitutional violation in this case, the Virginia Supreme Court's approach is problematic because it unnecessarily re-injects *Katz* into the Fourth Amendment's traditional interpretation. *See Jardines*, 569 U.S. at 11 (majority opinion) ("One virtue of the Fourth Amendment's property-rights baseline[7] [i.e., over the *Katz* test] is that it keeps easy cases easy."); *see infra* Sections I, I.A. This case

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[7] *See Jardines*, 569 U.S. at 11 (describing the trespass analysis as "the Fourth Amendment's property-rights baseline . . . .").

presents the Court with a critical crossroad because the outcome could signal whether the trespass-based interpretation of the Fourth Amendment retains its post-*Jardines*'s vitality – independent of *Katz*'s privacy-expectations test – or, instead, whether *Jardines*'s property-rights baseline is destined to become re-subsumed within *Katz*'s system of privacy-based warrant exceptions.

I. A Fourth Amendment "Search" Occurs When the Government's Warrantless Conduct *Either* Infringes On a Reasonable Expectation of Privacy *Or* Involves a Physical Intrusion (a Trespass) On a Constitutionally Protected Area to Perform an Investigation.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. As originally interpreted, the Fourth Amendment's protections were tied to common-law trespass, and were limited to those areas enumerated in the Fourth Amendment itself. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001). In *Silverman v. United States*, for example, the Court rejected as violating the Fourth Amendment the government's use of a "spike mike" – which was inserted "several inches into a party wall" until it touched a heating duct – to eavesdrop on the conversations of the premises' occupants. 365 U.S. 505, 506, 509-10 (1961) (emphasizing that the police investigation had been accomplished by an "unauthorized physical encroachment within a

constitutionally protected area," which was "beyond the pale" of earlier cases involving non-trespassory eavesdropping). And, for many years, the trespass theory was the "exclusive basis" for obtaining Fourth Amendment protection. *Jardines*, 569 U.S. at 5.

However, the trespass model proved inadequate in an increasing number of circumstances. Technology made it possible for police to intrude on a person's privacy *without* a predicate physical trespass. The Court responded to these changing societal circumstances in its pathmarking decision, *Katz v. United States*, declaring there that the Fourth Amendment "protects people, not places." 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). In so holding, *Katz expanded* the reach of Fourth Amendment protections to include warrantless police investigation that intruded upon a person's "constitutionally protected reasonable expectation of privacy." *See id.* at 360 (Harlan, J., concurring); *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass."). For decades after *Katz*, the Court determined whether a place or a person's possessions or activities received Fourth Amendment protection based upon the reasonableness of the person's privacy expectation in that place, thing, or activity. *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (finding an objectively reasonable expectation of privacy in a bus passenger's carry-on luggage

– which was located in an overhead bin – because the agent palpated the bag in an "exploratory manner" that was more probing than other passengers would have touched the luggage).

Yet, the *Katz* test produced its own set of challenges. *Katz*'s privacy-expectations test was criticized for its lack of an objective yardstick by which to measure whether a person's privacy expectations were reasonable. *See Kyllo*, 533 U.S. at 34 ("The *Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable."); *see also Jones*, 565 U.S. at 427 (Alito, J., concurring in judgment) ("[J]udges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks."). Further, *Katz*'s adoption of a per se warrant requirement[8] led the Court to develop thereafter an "intricate body of law regarding 'reasonable expectation of privacy'" as a means of defining the Fourth Amendment's various warrant exceptions. *See California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in judgment) ("The victory [of a warrant requirement] was illusory. Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable.").

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[8] *See Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.") (footnote omitted).

And, more importantly, *Katz* arguably failed to adequately protect against the very police conduct that gave rise to the Fourth Amendment – warrantless police trespass. In *United States v. Jones*, decided in 2012, the Court considered whether the government violated the Fourth Amendment when it installed, without a warrant, a Global-Positioning-System (GPS) tracking device onto the undercarriage of Jones's vehicle and used the device to monitor the car's movements for twenty-eight days. *See* 565 U.S. at 403 (majority opinion) (explaining also that a vehicle is an "effect" for Fourth Amendment purposes). The government in *Jones* argued that no warrant was required because, under *Katz*, Jones lacked an expectation of privacy in both the undercarriage of his vehicle and the vehicle's movements as it traveled on the open road. *See id.* at 406. But the Court refused to apply the *Katz* test, choosing instead to base its analysis on the warrantless, governmental trespass that made the GPS-tracking possible in the first place. *See id.* ("But we need not address the Government's contentions [i.e., that *Katz* was not violated], because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

Rather than applying *Katz*, *Jones* instead held that the Fourth Amendment had been violated under the traditional, trespass basis of Fourth Amendment protection. *See id.* at 404-05 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment

when it was adopted."). As Justice Sotomayor explained in her separate *Jones* concurrence, the trespass test reflected "an *irreducible constitutional minimum*: When the Government physically invades personal property to gather information, a search occurs." *Id.* at 414 (Sotomayor, J., concurring) (emphasis added). She argued that applying *Katz* would "erode[] that long-standing protection . . . ." *Id.*

In *Jardines*, the Court elaborated on the trespass basis of Fourth Amendment protection. 569 U.S. 1 (2013). There, and without a warrant, police brought a drug-detection dog onto a home's curtilage – specifically, the home's front porch – in order to perform a drug-detection sniff of the air at the base of the front door. *Id.* at 4. *Jardines* described the case as "a straightforward one," and rejected the warrantless canine sniff as violating the Fourth Amendment because:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 5-6.

Jardines is also important because it illustrates the potential for *disagreement* in a case's outcome, depending on whether a court applies the trespass

test or, instead, *Katz*. Justice Scalia, writing for the *Jardines* majority, declined to apply *Katz* and concluded that, based upon a trespass analysis, the Fourth Amendment is violated "when the government uses a physical intrusion to explore details of the home (including the curtilage) . . . ." *See id.* at 11. Justice Kagan concurred to offer the observation, on behalf of two other Justices, that the outcome in *Jardines* would have been the *same* – i.e., that the warrantless canine sniff violated the Fourth Amendment – under both the trespass test and *Katz*. *See id.* at 12-13, 16 (Kagan, J., concurring) ("The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked . . . well, much like this one.").

Justice Alito, on the other hand, dissented on behalf of three other Justices, to express his disagreement with the majority's use of a trespass analysis. *See id.* at 23 (Alito, J., dissenting) ("While the Court claims that its reasoning has 'ancient and durable roots,' its trespass rule is really a newly struck counterfeit."). And, important here, Justice Alito *also* disagreed with the concurrence's interpretation of *Katz*, in which Justice Kagan concluded that the Fourth Amendment was violated because Jardines had a reasonable expectation of privacy in the odors emanating from under his door. *See id.* at 24-25. Like the concurrence, Justice Alito applied *Katz* but found no Fourth Amendment violation because, he argued, "[a] reasonable person understands that odors emanating from a house may be

detected from locations that are open to the public. . . ." *See id.* at 17.

Therefore, the Fourth Amendment model used has consequences, some of which are pragmatic. *Katz*'s privacy-expectations analysis is necessarily less black-and-white than the trespass test because *Katz* seeks to measure the privacy expectations of the "reasonable person" in the myriad of factual situations that lower courts consider every day. The pragmatic risk in applying a *Katz*-based doctrine to a classic trespassory search would be to open the door to the "thorny problems" inherent in *Katz*. *See Jones*, 565 U.S. at 412 (majority opinion). More importantly, the constitutional risk would be to expand the lawful bases for warrantless police entry beyond those permitted at common law. *See Steagald*, 451 U.S. at 211. Additionally, the outcome in this case could signal whether the trespass basis of Fourth Amendment protection retains its post-*Jardines*'s vitality or, instead, becomes re-subsumed, as a factor, into the *Katz* test.

A. *Katz*-Based Doctrines Should Be Reexamined in Light of *United States v. Jones* and *Florida v. Jardines* When Those Doctrines Undermine the Trespass Test's Interpretation of Fourth Amendment Protection.

Importing *Katz*-based doctrines and warrant exceptions into trespass-based search-and-seizure cases risks "erod[ing] that longstanding protection" embodied in the traditional interpretation of the Fourth Amendment. *Cf. Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). Courts are only now beginning to consider the potential impact of *United States v. Jones* and *Florida v. Jardines* on existing *Katz*-based, Fourth Amendment caselaw. A case that considers this potential conflict is *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016). There, Judge – now Justice – Gorsuch, writing for a panel of the U.S. Tenth Circuit Court of Appeals, considered the impact of *Jones* on a *Katz*-based, warrant exception, known as the private search doctrine. *See id.* at 1307-08 (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

The private search doctrine, in essence, stands for the proposition that a warrant is not required when the government searches an item whose contraband or criminal nature was uncovered through a private actor's search and then revealed to the government, and the government, in its later warrantless search, does not exceed the scope of the private actor's search. *See Jacobsen*, 466 U.S. at 117 ("Once frustration of the original expectation of privacy occurs, the Fourth

Amendment does not prohibit governmental use of the now-nonprivate information . . . ."). *Jacobsen* considered whether the warrantless search of a Drug Enforcement Administration (DEA) agent violated the Fourth Amendment when that agent was called in by Federal Express after its employees opened a damaged mailing parcel and discovered that it contained plastic bags filled with a white powder. *Id.* at 111-12. Specifically, *Jacobsen* considered whether the agent exceeded the scope of Federal Express's private search either because (1) the agent re-exposed the plastic bags from their mailing container (where Federal Express's employees had returned them prior to the agent's arrival), or (2) the agent's removal and destruction of a small amount of powder from the plastic bags in order to field test the suspected contraband. *See id.* ("A field test made on the spot identified the substance as cocaine.").

On the first question, *Jacobsen* held that, in re-unwrapping the mailing parcel's contents, the agent did not exceed the scope of Federal Express's private search of the package's contents. *Id.* at 120. On the warrantless field testing, *Jacobsen* also held that the private search doctrine was not violated (even though Federal Express had not tested the white powder) because the field test revealed no information aside from the fact that the powder was cocaine – information for which a person lacks a legitimate expectation of privacy. *See id.* at 123. Important here, *Jacobsen* acknowledged that the field test destroyed the powder used in the test, but concluded that the field testing was nevertheless reasonable because it had "only a de minimis

impact on any protected property interest." *See id.* at 125 ("[B]ecause only a trace amount of material was involved, the loss of which appears to have gone unnoticed by respondents, and since the property had already been lawfully detained . . . [,]" the warrantless field testing was reasonable when weighed against the government's interest in detecting drug crimes).

And this is where *Jacobsen* – in particular, *Jacobsen*'s destruction-of-private-property justification – intersects with *Ackerman*. In *Ackerman*, the defendant sent an email, which included four attachments, one of which triggered his internet service provider's hash-value filter for child pornography. 831 F.3d at 1293. Without opening the email or its attachments, the internet service provider (here, AOL) forwarded the suspicious email and attachments to the National Center for Missing and Exploited Children (NCMEC). *Id.* A NCMEC analyst opened the email and all four attachments, and confirmed that all four attachments contained child pornography. *Id.* After his indictment on child pornography charges, the defendant filed a motion to suppress the child pornography, which was denied, and he appealed. *Id.* at 1294.

The government in *Ackerman* argued that *Jacobsen* controlled because, like the field testing of the white powder in *Jacobsen*, NCMEC's inspection of the defendant's email and attachments could reveal no noncontraband information. *See id.* at 1306. The Tenth Circuit rejected this argument, however, finding *Jacobsen* inapplicable because NCMEC had clearly exceeded the scope of AOL's private search – i.e., NCMEC both

opened the defendant's email and its attachments and examined them, while AOL had done neither. *Id.* at 1305-06.

Important here, the Tenth Circuit also expressed reservations about relying on *Jacobsen* in any event, because that case's very foundation had been potentially undermined by *United States v. Jones*. *See id.* at 1307. As the court in *Ackerman* explained:

> Reexamining the facts of *Jacobsen* in light of *Jones*, it seems at least possible the Court today would find that a 'search' *did* take place there. After all, the DEA agent who performed the drug test in *Jacobsen* took and destroyed a 'trace amount' of private property, a seeming trespass to chattels. . . . Given the uncertain status of *Jacobsen* after *Jones*, we cannot see how we might ignore *Jones*'s potential impact on our case.

Id. (quoting *Jacobsen*, 466 U.S. at 125) (citation omitted).

The question, then, is whether a *Katz*-based, warrant exception, such as the automobile exception, *see infra* Sections II, II.A., can be used to *expand* the constitutional bases for warrantless police entry onto a home's curtilage – i.e., beyond those involving consent (express or implied), exigent circumstances, or a warrant.[9] *Amici* argue that it must not. As in *Ackerman*,

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[9] *See Steagald*, 451 U.S. at 211 ("The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is

Jones and *Jardines* have "potential[ly] impact[ed]"[10] the Virginia Supreme Court's conclusions regarding the scope of the automobile exception. *Cf. Collins*, 790 S.E.2d at 616-18. *Amici* urge the Court to find that, based upon the automobile exception's per se basis – i.e., this exception's "bright-line" authorization[11] of warrantless, probable cause-based police power – the warrantless search of a vehicle located, parked and unattended, within a home's curtilage violates the trespass model of Fourth Amendment protection.

II. Neither *United States v. Jones* Nor *Florida v. Jardines* Signal That the Automobile Exception – a Per Se, *Katz*-Based Warrant Exception – Can Trump the Fourth Amendment's Traditional Baseline of Protection Under the Trespass Test.

Based upon the automobile exception to the Fourth Amendment's warrant requirement, police may stop and search a vehicle without obtaining a warrant if they have probable cause to believe the vehicle contains contraband. *See United States v. Ross*, 456 U.S. 798, 807-09 (1982). The exception was originally justified by a vehicle's ready mobility. *See Carroll v. United States*, 267 U.S. 132, 153 (1925) (observing that "practically since the beginning of the government," the Court has recognized a difference between a search of

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unreasonable under the Fourth Amendment unless done pursuant to a warrant.").

[10] *See Ackerman*, 831 F.3d at 1307.

[11] *See Collins*, 790 S.E.2d at 618.

a "dwelling house or other structure" where "a proper official warrant readily may be obtained" and the search of an automobile "where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction . . . ."). Prior to *Katz*, however, the practicability (or the lack thereof) of obtaining a warrant remained an important consideration. *See Carroll*, 267 U.S. at 156. In fact, *Carroll* expressly instructed courts to determine whether the facts – i.e., the impracticability of obtaining a warrant – supported the warrantless, vehicle search. *See id.*. As *Carroll* explained:

> In cases where the securing of a warrant is *reasonably practicable, it must be used* and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is *impossible except without warrant*, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

Id. (emphasis added).

After *Katz*, however, the automobile exception came to be supported by additional justifications – justifications arising from society's reduced expectations of privacy in vehicles and vehicle travel. *See California v. Carney*, 471 U.S. 386, 391 (1985) ("[A]lthough ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception."). As *Carney* explained, society's reduced

expectations of privacy in vehicles were additionally based on "plain view" considerations – i.e., the ease of seeing into the passenger compartment of most vehicles, and because "pervasive schemes of [vehicle] regulation" made periodic vehicle stops "'an everyday occurrence . . . .'" *See id.* at 391-92 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). In two per curiam opinions, the Court made clear and reiterated that the automobile exception "has no separate exigency requirement." *See Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) ("And under our established precedent, the 'automobile exception' has no separate exigency requirement. We made this clear in *United States v. Ross*, 456 U.S. 798, 809 (1982)."); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) ("More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile. . . . If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.") (citation omitted).

A. The Automobile Exception Evolves, After *Katz*, into a Per Se Warrant Exception.

The Court's post-*Carroll* (but pre-*Katz*), vehicle-search decisions reveal that genuine, case-specific exigency existed in those cases where a warrantless vehicle search was justified under the automobile exception. Those cases focused on, for the most part, whether probable cause existed to support the

warrantless vehicle search at issue, not the reasonableness of law enforcement's decision to dispense with seeking a search warrant.

In each case where the warrantless vehicle search was upheld, the exigency at the scene of the vehicle stop was apparent. *Compare, e.g.*, *Brinegar v. United States*, 338 U.S. 160, 163, 175-76 (1949) (upholding, based on probable cause to believe the defendant was transporting illegal liquor in his vehicle, a warrantless vehicle search which occurred at the roadside after a one-mile police chase in which the agents had to physically force the defendant's vehicle off the road); *Scher v. United States*, 305 U.S. 251, 254-55 (1938) (upholding, based on probable cause to believe the defendant was transporting illegal liquor in his vehicle, a warrantless vehicle search which occurred after law enforcement tailed the defendant's vehicle until he pulled into his garage because "[p]assage of the car into the open garage closely followed by the observing officer did not destroy this right [i.e., of a warrantless search]."); *Husty v. United States*, 282 U.S. 694, 701 (1931) (upholding, based on probable cause to believe the defendant was transporting intoxicating liquor in his vehicle, a warrantless vehicle search which occurred at the roadside after two of the vehicle's occupants fled from the vehicle-stop scene), *with Preston v. United States*, 376 U.S. 364, 367-68 (1964) (rejecting the validity of a warrantless stationhouse search of the arrestee's vehicle as either a search incident to arrest or a probable cause-based search, because "there was no danger that any of the men arrested could have

used any weapons in the car or could have destroyed any evidence of a crime . . . ."). Even in *Cooper v. California*, a case decided just months before *Katz*, law enforcement's warrantless stationhouse search of the arrestee's impounded vehicle (which took place a week after his arrest) was justified on more than simply probable cause. 386 U.S. 58, 58, 61-62 (1967) ("It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time [i.e., the four-month period involved in the vehicle-forfeiture proceeding], had no right, even for their own protection, to search it.").

It was only *after Katz* – after the reduced privacy expectation associated with vehicles was factored into the warrant-exception analysis – that the automobile exception hardened into the per se warrant exception for which is it now known. *See Ross*, 456 U.S. at 809 (finding that, based on *Carroll*, a probable cause-based, vehicle search satisfied the automobile exception, "even though a warrant has not been actually obtained."). In fact, even in the early years after *Katz* was decided, the Court continued to recognize that *Carroll* had treated the existence of case-specific exigency as a consideration in justifying a warrantless vehicle search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 462-63 (1971) (plurality opinion) (finding that the automobile exception, under *Carroll*, was inapplicable to a warrantless search of the defendant's vehicle located, parked and unattended, in his driveway – explaining that "by no possible stretch of the legal imagination can this be made into a case where it is not practicable to secure a warrant, and the automobile exception,

despite its label, is simply irrelevant.") (internal quotation marks and citation omitted); *Chambers v. Maroney*, 399 U.S. 42, 50 (1970) ("Neither *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."). And in *Chambers*, the generalization of *Carroll*'s exigency justification can be seen to emerge. *See Chambers*, 399 U.S. at 50-51 (observing that a probable cause-based search of a "readily movable" vehicle was "most often unforeseeable").

Later, in *Ross*, the automobile exception completed its journey. To support its conclusion that the automobile exception was a per se warrant exception, *Ross* reviewed *Carroll*'s facts, reasoning, and justifications. *See Ross*, 456 U.S. at 804-09. Important here, *Ross* recast *Carroll*'s discussion of its proposed warrant exception – i.e., in which *Carroll* explained that law enforcement must obtain warrants for vehicle searches when "reasonably practicable," *see Carroll*, 267 U.S. at 156 – into, instead, a statement of the more general, Fourth Amendment proposition that a warrant exception is an "exception to the general rule that in cases where the securing of a warrant is reasonably practicable, it must be used . . . ." *See Ross*, 456 U.S. at 807 (internal quotation marks omitted). Notwithstanding this assertion about *Carroll*'s rationale, other language in *Ross* arguably acknowledged that the warrant exception in *Carroll* had been justified on case-specific exigency. *See id.* at 806-07 (recounting *Carroll*'s facts and explaining that "[g]iven the nature of an automobile *in*

transit," *Carroll* recognized that a warrant exception for the probable cause-based search of a vehicle was not, "[*i*]*n this class of cases*," unreasonable) (emphasis added).

Ross's reinterpretation of *Carroll* did not go unnoticed, however. Justice Marshall, in his *Ross* dissent, argued that *Carroll* had not established the per se warrant exception that the *Ross* majority had claimed. *See Ross*, 456 U.S. at 836 (Marshall, J., dissenting) ("The Court [in *Carroll*] did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable."). Justice Brennan joined in Justice Marshall's dissent in *Ross*, *see id.* at 827, and Justice White noted in his separate *Ross* dissent that he "agree[d] with much of Justice Marshall's dissent in this case." *Id.* at 826 (White, J., dissenting).

Two important conclusions flow from the automobile-exception jurisprudence. First, the automobile exception, as originally framed, was not the per se warrant exception that the modern Court now contemplates. Second, the modern interpretation of the automobile exception – which is based, in large part, on *Katz*'s reduced-privacy-expectations analysis – does not support a per se warrant exception in cases where a vehicle is located, parked and unattended, within a home's curtilage.

III. The Automobile Exception Does Not Automatically Apply to the Search of an Unattended Vehicle Parked Within a Home's Curtilage.

Warrantless police entry into the home is the "chief evil" against which the Fourth Amendment was intended to prevent. *United States District Court*, 407 U.S. at 313; *see United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (observing that "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."). The Fourth Amendment's protections also extend to a home's curtilage. *Oliver*, 466 U.S. at 180 (describing the common law's distinction between "open fields" and "curtilage," and observing that "only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home."). *Oliver* explained that curtilage was "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

In *California v. Ciraolo*, the Court described the protection afforded to the curtilage as "essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S. 207, 213 (1986). And, more recently, the Court reaffirmed that a home's curtilage "enjoys protection as part of the home itself." *Jardines*, 569 U.S. at 6 ("This right [i.e., to retreat into one's home and be free from unreasonable governmental

intrusions] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity. . . .").

The Virginia Supreme Court, in this case, concluded there was no need to determine whether the officer had entered onto the home's curtilage because it held that the automobile exception supported the officer's warrantless entry to perform the physical investigation of Petitioner's tarp-covered motorcycle. *See Collins*, 790 S.E.2d at 619 ("Collins argued that the automobile exception does not apply to a vehicle parked in a private driveway. The trial court did not consider this question, but the Court of Appeals addressed the issue and appeared to agree with Collins."). Important here, the Virginia Supreme Court in *Collins* also concluded that warrantless police entry to search a vehicle located on private property that was "open to the public" – such as a home's driveway – did not violate the Fourth Amendment. *See id.* at 619 (quoting *Thims v. Commonwealth*, 235 S.E.2d 443, 447 (Va. 1977)).

A. An Area That Is "Open to the Public" Can Receive Fourth Amendment Protection as Part of a Home's Curtilage.

The Court determines whether Fourth Amendment protection is afforded to private property depending on whether the property is an "open field" – in which case it receives no protection from warrantless police entry – or is, instead, a home or its associated

curtilage (which receives Fourth Amendment protection). *See Jardines*, 569 U.S. at 6 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). With that said, there is no "private driveway" exception that withholds Fourth Amendment protection simply because a home's driveway is often open to public view or is physically accessible to the public. In fact, after *Jardines* we now know that an area can be both "open to the public" *and* curtilage. *See id.* at 7 ("The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends.") (internal quotation marks omitted). Therefore, the Virginia Supreme Court erred in withholding Fourth Amendment protection from an area that was closely adjacent to, and intimately connected with, Petitioner's girlfriend's suburban home on the basis that the area could be seen, or was physically accessible from, the street.[12] *See Jardines*, 569 U.S. at 7 ("[T]he conception defining the curtilage is at any rate

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[12] Justice Mims, in his *Collins* dissent, described the location of Petitioner's parked, tarp-covered motorcycle as being "merely feet . . . from the side perimeter wall of the house." *Collins II*, 790 S.E.2d at 623 n.4 (Mims, J., dissenting). Specifically, the motorcycle was parked on a portion of the driveway that *extended beyond* the direct route to the front door. *See id.* (emphasis added) ("[T]he driveway extends past the house, running alongside it after the front yard ends, and continues well beyond the front porch and front door to allow vehicles to be parked beside the house."). The Virginia Court of Appeals "assume[d] without deciding" that Petitioner's motorcycle was parked within the home's curtilage at the time of the officer's entry and physical investigation. *See Collins v. Commonwealth*, 773 S.E.2d 618, 623 (Va. Ct. App. 2015).

familiar enough that it is easily understood from our daily experience.") (internal quotation marks omitted).

But that does not end the matter. To interact with a home's occupants, a police officer may, without a warrant, enter a home's curtilage via a direct pathway to the front door – i.e., the front walkway or, if none, the driveway – to engage the home's occupants. *See id.* at 19, 21 (Alito, J., dissenting) (observing that an implied license "has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot . . . take other circuitous detours that veer from the pathway that a visitor would customarily use."); *see also id.* at 8 (majority opinion) ("This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then . . . leave.").

Therefore, *Jardines* limits an officer's authority in critical ways. First, *Jardines* limits the officer's authority to stray from the home's front-door pathway onto other curtilage areas. *See id.* at 9 (majority opinion) ("The scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose."). Second, even if the officer sticks to the home's front-door pathway – i.e., the curtilage area an officer passes along or occupies in order to conduct a "knock and talk" encounter with the home's occupants[13] – the

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[13] *See id.* at 21 (Alito, J., dissenting) (discussing law enforcement's authority to perform a warrantless "knock and talk" encounter with a home's occupants, and explaining that a visitor's

officer is not permitted to investigate or gather information. *See id.* at 7 (majority opinion) ("[A]n officer's leave to gather information is sharply circumscribed when he steps off those [public] thoroughfares and enters the Fourth Amendment's protected areas."); *see also id.* at 9 n.3 (arguing that even if police "stay on the base path, to use a baseball analogy"– i.e., approach the home's front door by the direct, front-door pathway – police are not permitted to "gather[ ] evidence" without a warrant).

So, *Jardines* imposes a categorical prohibition on warrantless police investigation within a home's curtilage (aside from speaking with the home's occupant) and, additionally, restrains officers from detouring from the home's front-door pathway. Put another way, the Fourth Amendment protects the curtilage of a home from warrantless police investigation, even if that area is *physically* accessible to law enforcement in performing a lawful "knock and talk" – i.e., the area encompassing a home's front-door pathway as well as the front door itself – or that the area is *visually* accessible to the officer, either from the officer's lawful vantage point on the street or as that vantage point shifts due to the officer's lawful travel to the front door. *See id.* (emphasizing that the visual observation of the home's curtilage in *Ciraolo* "was done in a physically nonintrusive manner") (internal quotation marks omitted).

"implied license to approach the front door [also] extends to the police").

B. The Trespass Basis of Fourth Amendment Protection Was Violated by the Officer's Detour from the Direct Path to the Front Door and Physical Search of Petitioner's Tarp-Covered Motorcycle.

By disturbing the tarp to view the motorcycle's Vehicle Identification Number (VIN), the officer in this case engaged in an "investigation" within the meaning of *Jardines*. *See Jardines*, 569 U.S. at 9 ("To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhounds into the garden . . . would inspire most of us to – well, call the police."). Regardless of whether the motorcycle was parked *on* the direct, front-door pathway (it was not) or *within* the home's curtilage but beyond the home's direct, front-door pathway (it was), *Jardines* prohibits the officer's warrantless physical investigation of Petitioner's tarp-covered motorcycle. To put it differently, regardless of whether the tarp-covered motorcycle was *physically* accessible to the officer as he stood on the home's direct, front-door pathway or was, instead, simply *visually* accessible to the officer from either his vantage point on the street or while traversing the home's direct, front-door pathway, *Jardines* prohibits the officer's warrantless physical investigation of the motorcycle in either event. *Cf. id.* at 9 n.4 (distinguishing the lawfully conducted "knock and talk" at issue in *Kentucky v. King*, 563 U.S. 452 (2011), and observing "[b]ut no one is impliedly

invited to enter the protected premises of the home in order to do nothing but conduct a search.").

1. The Officer's Warrantless Investigation of Petitioner's Motorcycle Is Not Saved by *New York v. Class*, *United States v. Jacobsen*, or the Plain View Doctrine.

The officer's physical investigation of Petitioner's motorcycle is not saved by the Court's holding in *New York v. Class*, 475 U.S. 106 (1986). In *Class*, the Court considered whether the Fourth Amendment was violated when a traffic officer reached his hand into the passenger compartment of a lawfully stopped vehicle to shift papers on the vehicle's dashboard that obstructed the officer's view of the vehicle's VIN. *See id.* at 107-08. Although *Class* held that the officer's physical entry into the vehicle was a "search," *see id.* at 115, the Court found the search to be reasonable for two reasons. First, *Class* explained that drivers lack a reasonable expectation of privacy in their vehicles' VIN. *Id.* at 119. Second, and important here, Class's vehicle had been *lawfully seized* at the traffic stop. *Id.* (justifying the search, in part, on "the fact that the officers observed [Class] commit two traffic violations."). In contrast to *Class*, the investigating officer in this case violated *Jardines* in conducting his warrantless entry to investigate the motorcycle's VIN. Therefore, even though *Class* also involved an investigation of a vehicle's VIN, *Class* does not excuse the officer's unlawful

entry onto the home's curtilage to investigate and view Petitioner's motorcycle's VIN.

Nor is the officer's warrantless entry and investigation saved by *United States v. Jacobsen*, 466 U.S. 109 (1984). See *supra* Section I.A. *Jacobsen* justified upholding the agent's warrantless field test, in part, on the fact that the field test disclosed no noncontraband information – i.e., only whether the white powder was cocaine, but nothing else. *Jacobsen*, 466 U.S. at 122. As to the field test's disclosure of the contraband nature of the white powder, *Jacobsen* explained that a person lacks a legitimate expectation of privacy in contraband. *Id.*

Here again, however, the lawfulness of the police conduct *prior to* the field testing was key to *Jacobsen*'s decision to uphold the warrantless field test. To explain, *Jacobsen* viewed the agent's conduct as involving "two steps." *See id.* at 118. The first step concerned the agent's warrantless re-unwrapping of the mailing container's contents, which *Jacobsen* upheld under the private search doctrine. *Id.* at 120. Based upon the lawfulness of that threshold search, *Jacobsen* proceeded, in the second step, to determine the reasonableness of the warrantless field testing. *See id.* at 122-23, 125; see *supra* Section I.A.

This case is quite different from the searches in *Jacobsen*. Here, the officer's warrantless physical investigation of Petitioner's tarp-covered motorcycle was made possible only by a Fourth Amendment violation – i.e., violation of the trespass basis of Fourth

Amendment protection under *Jardines*. Further, unlike the field testing in *Jacobsen*, the physical search of Petitioner's tarp-covered motorcycle was capable of revealing noncontraband information. *Compare id.* at 122 ("[The field test] could tell [the agent] nothing more, not even whether the substance was sugar or talcum powder."), *with Ackerman*, 831 F.3d at 1306-07 (posing the question, in dicta, of whether NCMEC's search of the defendant's email and attachments risked exposing noncontraband information because, among other reasons, AOL's hash-value match could have been mistaken); see *supra* Section I.A. In this case, there was no way for the officer to know in advance whether additional private and protected facts – i.e., a child's bicycle helmet – was *also* concealed under the tarp.

Further, the officer's warrantless entry and search of Petitioner's motorcycle is not saved by the plain view doctrine. The plain view doctrine authorizes a police officer, under certain circumstances, to seize contraband or an evidentiary item without a warrant when that contraband or item is plainly visible to the police officer. *See Coolidge*, 403 U.S. at 465. Those circumstances include, first, that the officer must observe the contraband or item from a lawful vantage point. *See Horton v. California*, 496 U.S. 128, 137 (1990) ("It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly seen."). Second, the item's "incriminating character must . . . be immediately apparent," *see id.* (internal quotation marks omitted), without the officer's manipulation of

the item. *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("[T]he distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment.") (internal quotation marks omitted). Important here, the item's incriminating character is not considered to be "immediately apparent" if "some further search of the object" was conducted to confirm the item's nature. *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (holding that the Fourth Amendment was violated by the officer's physical manipulation of a "small lump," that the officer detected in the defendant's jacket pocket during a lawful *Terry* stop, to confirm the officer's suspicion that the lump was a rock of crack cocaine). And third, the officer must have "a lawful right of access to the object itself." *See Horton*, 496 U.S. at 137 ("[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.").

The investigating officer's actions in this case do not fall within the plain view doctrine. The motorcycle's VIN could not be seen until the officer disturbed the tarp – i.e., performed a "further search" of the tarp-covered motorcycle. *See Dickerson*, 508 U.S. at 375; *Hicks,* 480 U.S. at 328 (observing that the officer, in moving the stereo equipment to view the items' serial numbers, had done more than "merely look[ ] at what is already exposed to view, without disturbing it . . . ."). Moreover, the officer lacked a lawful right of access to the motorcycle itself. The officer in this case violated *Jardines* because he both conducted an investigation

within the home's curtilage and detoured from the home's front-door pathway onto the home's protected curtilage area to perform the further search of Petitioner's motorcycle. See *supra* Section III.A.; *see Hicks*, 480 U.S. at 329 (explaining that the officer's lack of authority, without a warrant, to move the stereo equipment to check the items' serial numbers was the same limitation he would have had "if, while walking along the street he had noticed the same suspicious stereo equipment sitting inside a house a few feet away from him, beneath an open window."). Therefore, the plain view doctrine is inapplicable in this case.

CONCLUSION

For these reasons, the decision of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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